



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-060

June 5, 2015

Christy Peterson, Director
Human Resources
Saline County Courthouse
200 No. Main, Room 112
Benton, Arkansas 72015

Dear Ms. Peterson:

You have requested my opinion regarding the Arkansas Freedom of Information Act (the "FOIA").¹ The FOIA authorizes the custodian, requester, or the subject of personnel or employee-evaluation records to seek an opinion from this office stating whether the custodian's decision as to the release of such records is consistent with the act.²

Your letter indicates that you, as records custodian for the Saline County HR/Personnel Office, have received a FOIA request for records contained in the personnel file of a former employee of the Circuit Clerk's office. You state that you have preliminarily determined that one record, which you have provided for my review, is not subject to disclosure. You seek my opinion on that determination.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the record, it is my opinion that your decision is consistent with the FOIA.

¹ Ark. Code Ann. §§ 25-19-101 – 110 (Repl. 2014).

² Ark. Code Ann. A.C.A. § 25-19-105(c)(3)(B)(i).

DISCUSSION

A document must be disclosed in response to an FOIA request if three conditions are met: first, the FOIA request is directed to an entity subject to the act; second, the requested document constitutes a “public record”; and third, the document does not fall within an express exception to disclosure requirements.

The first element is clearly met in this case, inasmuch as the Saline County HR/Personnel Office is clearly a public entity.

With respect to the second element, the FOIA defines the term “public records” as follows:

“Public records” means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.³

Based upon my review of the record here at issue, I conclude that it clearly qualifies as a “public record” under this definition and must be disclosed unless some specific exception provides otherwise.

Under certain conditions, the FOIA exempts from disclosure two distinct types of employee-related records: “personnel records”⁴ and “employee evaluation or job

³ A.C.A. § 25-19-103(5)(A) (Supp. 2013).

⁴ Ark. Code Ann. § 25-19-105(b)(12): “It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter ... [p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”

performance records.”⁵ The test for whether these two types of documents may be released differs significantly. It is my conclusion that the relevant exemption in this case is the one for employee-evaluation records.

The FOIA does not define “employee evaluation or job performance records.” However, the Arkansas Supreme Court has adopted this office’s view that this term refers to any records (1) created by or at the behest of the employer (2) to evaluate the employee (3) that detail the employee’s performance or lack of performance on the job.⁶

Based upon my review of the requested document, I conclude that it constitutes an employee-evaluation record under this definition. Accordingly, it cannot be released unless all the following elements have been met:

1. The employee was suspended or terminated (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., relevance); and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).⁷

⁵ Ark. Code Ann. § 25-19-105(c)(i): “Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.”

⁶ *Thomas v. Hall*, 2012 Ark. 66, **8-9, 399 S.W.3d 387; for prior applications of this test by this office, see, e.g., Op. Att’y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-111; 2003-073; 98-006; 97-222; 95-351 and 93-055.

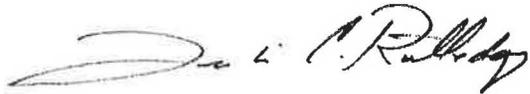
⁷ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.

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Suspension or termination is thus a threshold requirement for the release of employee-evaluation records. Although you have not indicated whether the former employee was suspended or terminated, I gather from the face of the record at issue that there was no suspension or termination in this case. The FOIA therefore requires that the record be withheld from public disclosure. Accordingly, it is my opinion that your decision is consistent with the FOIA.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge". The signature is written in a cursive style with a large initial "L" and "R".

LESLIE RUTLEDGE
Attorney General

LR/EAW:cyh